COPY

No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

MORRISON-KNUDSEN COMPANY, INC., WALSH CONSTRUCTION COMPANY, and PERINI-QUEBEC, INC., Joint Venturers Doing Business As ROBINSON BAY LOCK CONSTRUCTORS; MORRISON-KNUDSEN COMPANY, INC., B. PERINI & SONS, INC., WALSH CONSTRUCTION COMPANY and UTAH CONSTRUCTION COMPANY, A Joint Venture and SELBY DRILLING CORP., *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

O. P. EASTERWOOD, JR.
McNUTT, DUDLEY & EASTERWOOD
Barr Building
Washington 6, D.C.

GERALD DeGARMO
SETH W. MORRISON
ALLEN, DeGARMO & LEEDY
1308-20 Northern Life Tower
Seattle 1, Washington
Attorneys for Respondents.

THE ARGUS PRESS, SEATTLE

No. 978

In the
Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MORRISON-KNUDSEN COMPANY, INC., WALSH CONSTRUCTION COMPANY, and PERINI-QUEBEC, INC., Joint Venturers Doing Business As ROBINSON BAY LOCK CONSTRUCTORS; MORRISON-KNUDSEN COMPANY, INC., B. PERINI & SONS, INC., WALSH CONSTRUCTION COMPANY and UTAH CONSTRUCTION COMPANY, A Joint Venture and SELBY DRILLING CORP., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

O. P. EASTERWOOD, JR.
McNUTT, DUDLEY & EASTERWOOD
Barr Building
Washington 6, D.C.

GERALD DEGARMO
SETH W. MORRISON
ALLEN, DEGARMO & LEEDY
1308-20 Northern Life Tower
Seattle 1, Washington
Attorneys for Respondents.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Questions Presented	1
Statute Involved	3
Statement of the Case	5
A. Prior Proceedings	5
B. Factual Background	9
Argument in Opposition to Certiorari	15
A. The case does not have future significance	15
B. The condition out of which the case arose no longer exists, and the case is therefore de facto moot	17
C. A review of discretion reasonably exercised is not warranted	18
D. There is in fact no conflict in decisions reviewing the Board's imposition of the Brown-Olds doctrine under circumstances of present case	20
E. No substantial conflict exists	21
Conclusion	23

TABLE OF CASES

Brown-Olds Plumbing & Heating Corporation, 115 N.L.R.B. 594 ..... 21, 22

Morrison-Knudsen Company, Inc. v. National Labor Relations Board, 275 F.(2d) 914 7

National Labor Relations Board v. Broderick Wood Products Company (C.A. 10) 261 F.(2d) 548 ..... 22, 23

National Labor Relations Board v. District 50, United Mine Workers of America (1958) 355 U.S. 453, 2 L.ed.(2d) 401, 78 S.Ct. 386 16

National Labor Relations Board v. Pittsburg Steamship Company (1951) 340 U.S. 498, 95 L.ed. 479 ..... 18, 19

National Labor Relations Board v. Seven-Up Bottling Company (1935) 344 U.S. 344, 97 L.ed. 377, 73 S.Ct. 287 ..... 16, 23

National Labor Relations Board v. United States Steel Corporation, ... F.(2d) ..... (C.A. 3), 40 CCH Labor Cases, para. 66425, decided April 13, 1960 23

STATUTES

	Page
National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 61 Stat. 136:	
Section 7	3
8(a) (1)	3
8(a) (3)	3
(8)(f)	18
10(c)	3
10(f)	4
8(b)	18

COURT RULES

Supreme Court Rules, Rule 19	2, 15

In the
Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MORRISON-KNUDSEN COMPANY, INC., WALSH CONSTRUCTION COMPANY, and PERINI-QUEBEC, INC., Joint Venturers Doing Business As ROBINSON BAY LOCK CONSTRUCTORS; MORRISON-KNUDSEN COMPANY, INC., B. PERINI & SONS, INC., WALSH CONSTRUCTION COMPANY and UTAH CONSTRUCTION COMPANY, A Joint Venture and SELBY DRILLING CORP.,
Respondents.

No. 978

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents submit the following Brief in opposition to the Petition for Writ of Certiorari filed by the National Labor Relations Board in this cause.

QUESTIONS PRESENTED

The National Labor Relations Board found and the Court of Appeals confirmed that a union had violated the National Labor Relations Act by giving employment preference to certain union members over other applicants through the union hiring hall, and that an employer who utilized that hiring hall also violated the Act under the doctrine of the principal's responsibility for

the agent's conduct, regardless of actual knowledge or participation in such preference. The Court held, however, that notwithstanding the narrow scope of judicial review of a National Labor Relations Board Order, an Order requiring reimbursement to all employees by the employer for all dues and fees paid to said union from March 31, 1956 to the present was, under all of the circumstances of the case, inappropriate and arbitrary, and the Court granted enforcement of all portions of the Board Order except the reimbursement provision. The question is whether such exercise of reviewing discretion by a Court of Appeals under the circumstances of this case presents such a special and important reason for review as to warrant granting of certiorari by the Supreme Court under the criteria of Rule 19 of the Supreme Court Rules.

If certiorari is granted, the questions presented are (1) whether by uniformly requiring referral through a union hiring hall, an employer is responsible for such National Labor Relations Act violations as the union may commit, as distinguished from actual and knowing participation by the employer in acts of discrimination by the union; and (2) whether the Board may in all cases it chooses, free from judicial review, require payment by an employer to employees in the amount of all union fees and dues paid by such employees, notwithstanding the absence of any evidence of discrimination or coercion as to individual employees.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act set forth in Petitioner's Brief (Sections 7, 8(a)(1), 8(a)(3) and 10(c)), the Respondents also submit that the following provisions relating to judicial review of the Board's Order are also relevant, as the principal issue is the nature and scope of judicial review of a Board Order.

Section 10(e). "The Board shall have power to petition any United States Court of Appeals (including the United States Court of Appeals for the District of Columbia) or if all the United States courts of appeals to which application may be made are in vacation, any United States district court, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and *shall have power to grant* such temporary relief or restraining order as it deems just and proper, and *to make and enter* upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and *enforcing as so modified*, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the

Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. *The jurisdiction of the court shall be exclusive and its judgment and decree shall be final*, except that the same shall be *subject to review* by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the *Supreme Court of the United States upon writ of certiorari* or certification as provided in sections 346 and 347 of Title 28."

10(f). "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order

in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." (Emphasis supplied)

STATEMENT OF THE CASE

A. Prior Proceedings

On August 31, 1956, a charge was filed against the above-named employer Respondents by one Harold Blum, a complainant who was not and had never been an employee of the Respondents. On October 3, 1957, a consolidated complaint was issued. A hearing was

held in January, 1958 and on March 6, 1958, the intermediate report of the trial examiner was issued. In this report, the trial examiner dismissed one of the cases but found as to three other Respondent parties that by reason of their utilization of the union hiring halls, they were equally responsible with Local 545, the union involved, for illegal preferential hiring practices found to have been committed by the union. The trial examiner recommended a cease and desist order from the practices found and recommended posting of the usual notices at the respective job offices. The trial examiner did not recommend reimbursement to any employees (R. 250 through 252).

On March 4, 1959, the Board entered its decision and order, affirming the findings of the trial examiner but adding the reimbursement provision as follows (R. 278):

> "Therefore, to expunge the effects of these unlawful exactions, we shall order the Respondents to refund to present and former employees, the work permit fees, initiation fees, dues and other monies the employees have thus been required to pay. A Respondent's liability, however, shall be limited only to monies paid by its employees to Local 545 so that one Respondent shall not be liable for refund of monies paid by the employees of another company. Furthermore, the period of liability for all the Respondents shall respectively begin 6 months before the date of the filing and service of the initial charge against each Respondent and shall extend to all monies thereafter paid which have not heretofore been refunded.
>
> "Contrary to the Trial Examiner, we do not be-

lieve that the fact that some of the Respondents originally joined in this proceeding had obtained concessions in the course of settlement of charges against them is sufficient reason to omit the Board's established remedy for the unfair labor practices of those whose cases were litigated herein."

Respondents petitioned to the United States Court of Appeals for the Second Circuit to review the findings and remedy of the Board, and on March 2, 1960, that Court affirmed the findings but set aside the reimbursement provision of the Order, explaining its reasons as follows (275 F. (2d) 911 at page 917):

"We turn now to the propriety of the remedy. The cease and desist provisions of the order should be enforced. But we deny enforcement to the provision of the Board's order requiring 'the Respondents to refund to present and former employees, the work permit fees, initiation fees, dues and other monies the employees * * * have been required to pay.' We think this remedy to be unduly harsh and penal in nature . . ."

Page 918:

"In the circumstances of this case it seem to us that the Board's remedy goes far beyond merely effectuating the policies of the Act. The remedy would require the employers to pay back not only the permit fees paid by non-union workers and members of other locals but to reimburse long standing members of Local 545 for the dues paid by them. There is no evidence of any kind in the record to suggest that, but for the illegal conduct of the employers and the union, any of the Local 545 members would have resigned from the local and thereby avoided payment of union dues. Reimbursement of

these employees represents a windfall to them at the expense of their employers.

"Furthermore, even as applied to the members of other locals and those men not members of any union, we think the remedy is unfair. *The order requires the employers, who at most received indirect financial benefit from the unlawful practices, to pay back all of the dues, permit fees and initiation fees collected by the union local. At the same time the primary beneficiary of the unlawful conduct and undeniably the most culpable of the parties, Local 545, has been permitted to retain in its treasury the funds unlawfully exacted by it.* In this respect the present case is distinguishable from *Virginia Electric & Power Co. v. N.L.R.B., supra*, where the company was required to reimburse employees for dues it had itself unlawfully exacted through the company union as a condition of employment. Moreover, adoption of the reimbursement remedy in the present case was contrary to a policy announced by the N.L.R.B.'s General Counsel prior to the bringing of this proceeding. In spite of this stated policy declaration of a moratorium on the use of the Brown-Olds remedy, the General Counsel in his exception to the Trial Examiner's intermediate report specifically objected to the Examiner's refusal to impose the reimbursement remedy in this case. While, of course, the Board is not bound by the policy announced by the General Counsel, his statements and the probable reliance of the petitioners upon them should certainly have been given weight by the Board in deciding what remedy was appropriate.

"Under these circumstances imposition of the reimbursement remedy seems to us inappropriate

and arbitrary. Accordingly, the order of the Board is modified by striking out the provisions in paragraph 2, relating to reimbursement, and as thus modified, enforcement of the order is granted." (Emphasis ours)

B. Factual Background

There are three separate Respondents in the present case, having been charged separately and having performed separate portions of the St. Lawrence Seaway construction and power project. "Robinson Bay" is a joint venture consisting of Morrison-Knudsen Company, Inc., Walsh Construction Company and Perini-Quebec, Inc.

"Massena Intake" is a joint venture consisting of Morrison-Knudsen Company, Inc., B. Perini & Sons, Inc., Walsh Construction Company and Utah Construction Company.

Selby Drilling Corporation is a separate operation.

Robinson Bay was engaged in the construction of Robinson Bay Lock from February, 1956 under contract with the United States Government. Massena Intake was engaged from approximately August, 1955 in the power project construction of the Massena Intake, under contract with the power authority of the State of New York. Selby was engaged in the performance of sub-contract work for various prime contractors on the St. Lawrence Seaway and power projects. All projects were completed by the end of 1957.

During the relevant period of time there were between 35 and 40 construction contractors simulta-

neously performing projects in connection with the St. Lawrence Seaway and Power Project (R. 208). Massena is in upper New York State and in an area not heavily populated or engaged in heavy industrial pursuits. Accordingly, upon the commencement of the St. Lawrence Seaway and Power Project with the consequent heavy demand for operating engineers as well as for all other crafts necessary to heavy construction, a serious shortage of qualified workmen immediately developed and continued. None of the 35 or 40 contractors attempted to maintain independent employment offices as such, but did call upon Local 545, International Union of Operating Engineers, AFL-CIO, hereinafter referred to as Local 545, to supply the greater part of the employment requirements.

Many of the men supplied were members of Local 545, most of the remainder were members of other locals of the International Union, and a few were not members of any union.

The method of utilization was uniform as to all of the contractors involved at the St. Lawrence Seaway project. The Trial Examiner, as confirmed by the Board, found the following (R. 231-232):

> "There was no agreement by Respondents to hire only Union members or to hire all the men whom the Union referred, and Armitage had on some occasions refused to hire some such men. The Union never refused clearance to any of the men whom Respondents brought in, nor did it refuse Respondents' requests for permission to upgrade or promote employees. The Union never requested Respondents to give preference in hiring or reten-

tion of employment to its members or to members of Operating Engineers. Despite the union-security clause of the contract, Local 545 at no time requested non-members to join the Union or requested Respondents to release an employee for failure to pay either membership dues or work permit fees. Respondents had no knowledge of the Union membership, or lack of it, of any of their engineers and no knowledge as to the payment of membership dues to Local 545."

The sole basis of the finding of unfair labor practice against Respondents was the practice of routing all employees through the Union for referral slips. This practice alone was held not to be illegal (R. 237), but where the Union engaged in unlawful employment preference in granting referrals, the employers were held vicariously responsible, regardless of actual knowledge or participation, and notwithstanding the fact that the finding of a practice was based on the testimony of only two employment applicants at Local 545's hall (R. 234-235).

The events of discrimination alleged occurred in March, 1956, and the Complaint was filed in August, 1956. Approximately two years later, on February 7, 1958, the general counsel for the National Labor Relations Board circulated a general statement of policy to the employee and employer organizations in the construction industry, recognizing the historic practice of union hiring hall referral system in the construction industry and advising of a policy of non-application of the reimbursement doctrine provided all parties in the industry voluntarily conformed their practices to the

requirements of the Act by June 1, 1958. The full text of the letter provides as follows (R. 297-298):

"GENERAL COUNSEL'S LETTER—Feb. 7, 1958

COPY

NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

February 7, 1958

1) Building & Construction Trades Dept., AFL-CIO

2) Associated General Contractors

3) National Contractors Association

As you know, the Board, commencing with the *Brown-Olds case*, 115 NLRB 594, has held that where illegal hiring arrangements exist, either pursuant to a contract or practice, the appropriate remedy, in addition to the usual remedial provisions, requires the reimbursement of all monies, including initiation fees, dues, permit fees, assessments, 'dobies,' and the like, collected pursuant to such arrangements. The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements.

"It would be preferable, of course, if the parties took it upon themselves to correct their illegal hiring arrangements, thereby achieving the same basic purpose sought by the Board but without the necessity of Board action. Such over-all elimination of illegal hiring arrangements, by voluntary action, would not only help effectuate the purposes

of the Act, but would clearly be an important step in the general public interest and in the furtherance of the fundamental rights of employees.

"With this thought in mind, I would like to suggest that during a period of three months, commencing March 1, 1958, employers and unions, who are party to illegal hiring arrangements, vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947. If this is done, it may warrant the disposition, without full application of the *Brown-Olds* reimbursement remedy, of charges based upon illegal hiring arrangements which have been voluntarily conformed to the provisions of the Act during the period prior to June 1, 1958. It will also warrant my recommending to the Board during such period a similar disposition of all cases currently pending or brought before the Board with respect to such illegal hiring arrangements. It is understood, however, that apart from the non-application of the *Brown-Olds* reimbursement remedy, all charges and cases relating to or arising out of illegal hiring arrangements must be processed in normal fashion although such arrangements may have been corrected during the period prior to June 1, 1958.

"The Office of the General Counsel will be pleased to cooperate with employers and unions in this matter.

Very truly yours,

(Signed) JEROME D. FENTON
General Counsel"

Even prior to the General Counsel's statement of policy, the Respondent Morrison-Knudsen Company,

Inc. had circulated throughout its organization a bulletin directed towards eliminating any possible illegal hiring practices (R. 303-306) and thereafter on March 31, 1958 specifically provided for strict compliance with the General Counsel's letter (R. 307-310).

As to the appropriateness of the remedy under the circumstances of the case, the Trial Examiner concluded (R. 248-249):

> "Because of the General Counsel's suggestion that the remedy should include an order requiring Respondents to make reimbursement of all permit fees during a period back to 6 months prior to the filing of the charges, it is necessary to consider the posture of this proceeding as originally brought and as it stood after the settlement and severance of the other cases. The complaints in the CA cases alleged as to all [12] Respondents the maintenance by each of the same unlawful referral arrangement and practice as was alleged as to the present Respondents. A separate complaint in Case No. 3-CE-274 against the International Union and Local 547 was also based in part on the same arrangement.
>
> "As a result of the settlement, all of the cases were severed, except the four which are listed in the caption hereto (see footnote[1]), and those settlements have now been approved by Board orders which have been noted officially by the Examiner. In none of the settlements was any of the Respondents (including the Union) required to make reimbursement of the permit fees. Inasmuch as the General Counsel, by accepting such a settlement with the Union, has permitted the release of a joint tort feasor, without providing for satisfaction by it or of any portion of its joint and several liability

(cf. *H. M. Newman*, 85 NLRB 725, 732, and footnote 22), it would be manifestly unjust and inequitable—particularly since the Union alone collected and received the unlawful benefits in their entirety—now to hold only those Respondents who chose not to capitulate wholly liable and legally responsible for remedying wrongs in which the Union participated, which it was equally responsible for remedying, but for which the settlement releases it from liability.

"The recommended order will therefore omit any requirement that Respondents make reimbursement of the permit fees."

ARGUMENT IN OPPOSITION TO CERTIORARI

Respondents submit that there are no special or important reasons for granting certiorari in the present case, as required by Rule 19 of the Supreme Court Rules.

A. The case does not have future significance.

It would appear that Petitioner seeks certiorari on the ground that an important question on the scope of the Board's power to fashion an order is involved. Actually, no such question exists. The Court of Appeals in this case did not say that under no circumstances could an employer be required to reimburse an employee or applicant for dues or initiation fees. All the Court of Appeals did was to state that the remedy was excessive and inappropriate under all of the facts of the pending case. The following is quoted from Page 918 of the Court of Appeals Decision:

"*In the circumstances of this case* it seems to us

that the Board's remedy goes far beyond merely effectuating the policies of the Act." (Emphasis ours)

This power of review exists without question under Section 10(e) and (f) of the National Labor Relations Act, and has been repeatedly exercised by this Court and all Courts of Appeal. *National Labor Relations Board v. District 50, United Mine Workers of America* (1958) 355 U.S. 453, 2 L.ed. (2d) 401, 78 S. Ct. 380.

It may be that after the publicity, the initial warning, the termination of the moratorium period and the general emphasis on educating the construction industry to the recently refined requirements of hiring hall operation, a reimbursement order might be an appropriate remedy in a case involving a deliberate and continuous violation. However, that is clearly not the present case.

The real issue which the Petitioner raises in the present case is whether judicial review of a Board's Order is precluded when the Board merely recites that the Order "will effectuate the policies of the act" (R. 277).

The existence of such power of review is so well established by case and statute as to warrant no further comment. This Court's statement in the case of *National Labor Relations Board v. Seven-Up Bottling Company* (1953) 344 U.S. 344, 97 L.ed. 377, 73 S.Ct. 287, is particularly appropriate, page 383:

> "This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation, op-

pressive and therefore not calculated to effectuate a policy of the Act."

Petitioner states on the bottom of page 7 and the top of page 8 of its brief that the case presents the question of whether the Board, as a remedy for hiring practices which unlawfully encourage union membership, may require that all monies paid by the employees to the union while subjected to those practices be repaid to them. This statement of the issue is simply not correct. The Court of Appeals in the present case very carefully outlined the standards and scope of review, as established by the decisions of this Court and concerning which there is no present controversy. The Court of Appeals simply applied those standards to the facts of the present case and found that the Board's Order did not under such facts meet the established standard. The Court did not even purport to rule on whether a blanket reimbursement order would ever be appropriate under any circumstances. There is therefore no substantial legal issue of future significance involved.

B. The condition out of which the case arose no longer exists, and the case is therefore de facto moot.

The situation existing at the time of the charges and complaint in this case terminated with the general promulgation of the General Counsel's bulletin and the emphasis by the Board on [illegible]ecting the operation of hiring halls in the construction industry. This occurred during the years 1957, 1958 and 1959. The General Counsel in preparing and issuing his general bulletin clearly recognized that adequate warning of strict supervision of hiring halls in the construction industry

was only fair and reasonable. The temporary and shifting nature of the work, the remoteness of locations and the constant turnover of both employers and employees made the union hall the logical and focal point of hiring activity. With conflicting jurisdictions, and seasonal or area extremes of supply and demand, the construction industry was somewhat more susceptible to violations of the Act than most other industries.

Congress recognized the necessity of special provisions for the construction industry and in 1959 amended the National Labor Relations Act by adding Section 8(f) providing for prehire agreements which could require union membership seven days from employment.

Where the field has been entered by both the General Counsel, the Courts, and Congress since the occurrence of the events out of which the present case arose, there would appear to be no substantial importance from a factual or policy standpoint in reviewing the disposition of this case.

C. A review of discretion reasonably exercised is not warranted.

There can be little question but that in the present case the denial by the Court of Appeals of enforcement of the blanket reimbursement order was well within the scope of reasonably exercised discretion granted to the Court of Appeals. It was no less than the order recommended by the Trial Examiner himself.

The reasons for not granting certiorari in such a case are fully set forth in *National Labor Relations Board*

v. Pittsburg Steamship Company (1951) 340 U.S. 498, 95 L.ed. 479, from which the following is quoted commencing on page 502:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeal and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . .' Taft-Hartley Act § 10(e), 61 Stat. 149, ch. 120, 29 U.S.C. (Supp. III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 67 L.ed. 712, 714, 43 S.Ct. 422; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeal involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because

were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U.S. 543, 544, 71 L.ed. 1193, 1194, 47 S.Ct. 663."

D. There is in fact no conflict in decisions reviewing the Board's impositon of the *Brown-Olds* doctrine under circumstances of present case.

There have been at most different results under different circumstances, although under most circumstances the various Courts of Appeal have held that the blanket reimbursement doctrine constitutes a prohibited penalty and not a remedial order.

Petitioner on page 8 asserts as follows:

"As shown in the Board's petition in No. 929, the question is of importance in the administration of the Act, and there is a conflict of decisions on the point."

These Respondents have not been favored with a copy of the Board's petition in No. 929, nor are we aware of any rule or provision which would permit the inclusion by reference of arguments and contentions made in a different case involving different parties in the

brief of an instant case. We therefore request that the Court disregard any such arguments as may be contained in the petition referred to, although these Respondents will address themselves to the assertion that there is a conflict of decisions.

E. No substantial conflict exists.

In 1956 (the year in which the asserted unfair practice occurred in the present case) the National Labor Relations Board entered an order in the case of *Brown-Olds Plumbing & Heating Corporation*, 115 N.L.R.B. 594, requiring reimbursement of all monies collected by the Union pursuant to a *written contract* with employers *specifically requiring membership* in the Union in good standing as a condition of hire. There also existed a 2 per cent net wage assessment in addition to initiation fees and dues. Reimbursement was required without reference to whether in fact the payment was coerced, such coercion being conclusively presumed without evidence or specific findings as to individual employee payments. A twenty-year member of the Union would be conclusively deemed to have been coerced into continuing his membership.

On page 599 of its decision, the Board emphasizes that "this is not a case involving isolated acts in violation of the statute." It appeared of fundamental importance to the Board's decision that the contract represented a calculated, deliberate, knowing and continuing violation of the Act by all parties, and was not merely a relapse into mistaken practices or other conduct of lesser significance. This case apparently was the

first time such an order was entered in the so-called illegal hiring hall cases, and represented the initiation of a new policy by the Board.

The *Brown-Olds* decision was not appealed to the Court of Appeals.

It is suggested that there is a conflict of opinion between Courts of Appeal in the application of this doctrine. No citation as to the conflicting decisions are submitted in the Petitioner's brief nor does Petitioner discuss the nature or scope of such conflict as is alleged to exist.

We know of no case in which the blanket reimbursement order has been sustained as to an employer under circumstances of the present case, and therefore we know of no case in conflict with the present case.

We are aware that in the case of *National Labor Relations Board v. Brodérick Wood Products Company* (C.A. 10) 261 F.(2d) 548, the employer was guilty of a direct violation of the Act by deliberately and knowingly threatening the discharge, upon Union demand, of some 64 employees unless they paid dues to the Union and signed authorization cards. In fact these employees were discharged and only a portion were reinstated and this only after paying the dues and signing the authorizations. A requirement that the employer and the Union jointly reimburse the employees for the dues and fees coerced in that flagrant case is entirely consistent with the many other decisions refusing reimbursement to thousands of employees where the employer's only conduct was to follow the uniform practice then existing

in the construction industry of obtaining practically all employees through the Union hall, and routing the remainder through the hall for purposes of health and welfare records and general availability planning.

A complete analysis of most of the decisions on dues reimbursement cases is contained in *National Labor Relations Board v. United States Steel Corporation*, ... F.(2d) ... (C.A. 3) 40 CCH Labor Cases, Paragraph 66425, decided April 13, 1960. We disagree with this analysis only to the extent that it cites *National Labor Relations Board v. Broderick Wood Products Company, supra*, as approving a blanket refund order, and not recognizing that this case followed the classic line of cases requiring reimbursement on proof of specific coercion.

In fact, both the present case and *Broderick Wood Products* cite and rely upon the case of *National Labor Relations Board v. Seven-Up Bottling Company* (1953) 344 U.S. 344, 97 L.ed. 377, 73 S.Ct. 287 as establishing the standard of review, the only difference between the cases being a different result under different facts.

CONCLUSION

Respondents submit that this case has neither future significance nor present significance, does not involve a substantial conflict in Court of Appeals' decisions, and involves no special or important reason which would warrant the granting of certiorari herein. It is therefore prayed that certiorari be denied.

Dated this 21st day of July, 1960.

Respectfully submitted,

O. P. Easterwood, Jr.

McNutt, Dudley & Easterwood

Barr Building
Washington 6, D.C.

Gerald DeGarmo

Seth W. Morrison

Allen, DeGarmo & Leedy

1208-20 Northern Life Tower
Seattle 1, Washington

Attorneys for Respondents.